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Supreme Court, U.S.
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No. 98-1976

IN THE

Supreme Court of the United States

SIMON C. FIREMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SUPPLEMENTAL BRIEF FOR SIMON C. FIREMAN, PETITIONER

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TABLE OF CONTENTS

I. THE OPINIONS IN *SHRINK* SUPPORT THE GRANTING OF THE PETITION AND THE RECONSIDERING OF *BUCKLEY* 1

A. THE THREE DISSENTING JUSTICES WOULD OVERRULE *BUCKLEY* 1

B. TWO CONCURRING JUSTICES STATE IN EFFECT THAT THE QUESTION IS SQUARELY PRESENTED WHETHER *BUCKLEY* SHOULD BE OVERRULED, AND APPEAR TO BE LEANING TOWARD OVERRULING IT ... 2

C. THE MAJORITY OPINION STATED THAT IN *SHRINK* THE COURT WAS NOT ASKED TO RECONSIDER *BUCKLEY* 4

II. *BUCKLEY* SHOULD BE RECONSIDERED SO THAT THE RECOGNIZED AND SPREADING DISAFFECTION AND DISTRUST DO NOT EXTEND FURTHER 5

CONCLUSION 5

TABLE OF AUTHORITIES

CASES:

Buckley v. *Valeo*, 424 U.S. 1 (1976) 1, 2, 3, 4, 5

Nixon v. *Shrink Missouri Government PAC, No. 98-963* 1, 4, 5

RULES:

Supreme Court Rules
Rule 15.8 1

SUPPLEMENTAL BRIEF FOR SIMON C. FIREMAN, PETITIONER

Pursuant to Rule 15.8 of the Supreme Court Rules, the Petitioner Simon C. Fireman files this Supplemental Brief and states that the decision of this Court on January 24, 2000, in *Nixon* v. *Shrink Missouri Government PAC*, No. 98-963, shows that *all* Justices appear to be interested in reconsidering *Buckley* v. *Valeo*, 424 U.S. 1 (1976) and that two concurring Justices (Breyer and Ginsburg, JJ.) may be inclined to join with the three dissenting Justices (Kennedy, Thomas and Scalia, JJ.) and overrule *Buckley*. The Petitioner's Writ should be granted so that the vital constitutional issues presented may be directly addressed.

In the alternative, this Court should grant the Petition, vacate the order of the Court of Appeals for the First Circuit, and remand to the Court of Appeals or the District Court for further consideration in light of the opinions in *Shrink Missouri*.

I. THE OPINIONS IN *SHRINK* SUPPORT THE GRANTING OF THE PETITION AND THE RECONSIDERING OF *BUCKLEY*.

A. THE THREE DISSENTING JUSTICES WOULD OVERRULE *BUCKLEY*.

In *Shrink Missouri*, three Justices declared outright that *Buckley* v. *Valeo* should be overruled. *Justice Thomas*, with whom *Justice Scalia*

joined, wrote in dissent, "our decision in *Buckley* was in error, and I would overrule it." *Justice Kennedy*, dissenting, referred to "limits which take no account of rising campaign costs" and "the outdated limit of $1,075 per contribution." He stated, "*Buckley* has not worked." He concluded, "I would overrule *Buckley*...."

B. TWO CONCURRING JUSTICES STATE IN EFFECT THAT THE QUESTION IS SQUARELY PRESENTED WHETHER *BUCKLEY* SHOULD BE OVERRULED, AND APPEAR TO BE LEANING TOWARD OVERRULING IT.

Two Justices, concurring in the majority opinion, indicate that this Court should consider whether, given inflation, the quarter-of-a-century-old $1,000 federal campaign contribution limit is now too low. *Justice Breyer*, with whom *Justice Ginsburg* joined, wrote:

> We should defer to its [the legislature's] political judgment that unlimited spending threatens the integrity of the electoral process. But we should not defer in respect to whether its solution, by imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legisla-

> tors from effective electoral challenge. *The statutory limit here, $1,075 (or 378, 1976 dollars), is low enough to raise such a question.*
>
> (emphasis added)

The concurring opinion then continued, "But given the empirical information presented — the type of election at issue; the record of adequate candidate financing post-reform; and the fact that the statute indexes the amount for inflation — I agree with the Court that the statute does not work disproportionate harm."

In contrast, the instant case involved an election for President of the United States, not state auditor, and the federal statute contained no index for inflation. The instant case also presents graphic evidence of the comparative media costs for political advertising in 1976 and 1997. This empirical information thus gives the concurring Justices the timely opportunity to reconsider *Buckley*, which, by the concurring opinion's conclusion, they seem inclined to do:

> But what if I am wrong about *Buckley*? Suppose *Buckley* denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance. If so, like Justice Kennedy, I believe the Constitution would require us to reconsider *Buckley*. With that understanding, I join the Court's opinion.

C. THE MAJORITY OPINION STATED THAT IN *SHRINK* THE COURT WAS NOT ASKED TO RECONSIDER *BUCKLEY*.

Delivering the opinion of the Court, *Justice Souter* stated that the respondents in *Shrink* did "no[t] call for any reconsideration of *Buckley*." That opinion concluded:

> Each dissenter would overrule *Buckley* and thinks we should do the same.
>
> The answer is that we are supposed to decide this case. Shrink and Fredman did not request that *Buckley* be overruled; the furthest reach of their arguments about the law was that subsequent decisions already on the books had enhanced the State's burden of justification beyond what *Buckley* required, a proposition we have rejected as mistaken.

The instant Petition *does* request that *Buckley* be overruled. Given the manifest importance of the issue and the opinions expressed in *Shrink Missouri*, this Court should now grant the Petition and address the issue. In the alternative, it is respectfully suggested that this Court grant the Petition, vacate the order of the Court of Appeals for the First Circuit, and remand to that court or to the District Court for further proceedings in light of the opinions in *Shrink Missouri*.

The further proceedings in the lower court or courts could evaluate the factual record already in this case as to the "economic truths" resulting from the $1,000 limit or could order the supplementing of that record as to the effect of the limit on the ability of a candidate to speak his message.

II. *BUCKLEY* SHOULD BE RECONSIDERED SO THAT THE RECOGNIZED AND SPREADING DISAFFECTION AND DISTRUST DO NOT EXTEND FURTHER.

In his dissent in *Shrink Missouri* Justice Kennedy wrote, "The very disaffection or distrust that the Court cites as the justification for limits on direct contributions has now spread to the entire political discourse." That disaffection and distrust will now surely spread further if, in light of the several opinions in *Shrink Missouri* and the apparent inability or unwillingness of the Congress to act, this Court does not soon reconsider *Buckley* and vote it up or down. The instant case presents that opportunity. Indeed, the very granting of this Petition may send the long-needed message to the Congress that, if it does not act, this Court is prepared to exercise its Constitutional function.

CONCLUSION

Therefore, for the reasons expressed herein and in the Petition for a Writ of Certiorari and the

Reply Brief for Simon C. Fireman, Petitioner, this Court should grant the Petition and consider this case on the merits or grant the Petition, vacate the judgment and remand the case to the Court of Appeals or the District Court for further proceedings.

Respectfully submitted,

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